United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

74-2399

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

GUISEPPE BARBERA,
Appellee

Appeal from the United States District Court
for the Northern District of New York

APPELLANT'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING
EN BANC

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INTRODUCTION

The United States respectfully petitions this Court for a rehearing, and suggests a rehearing, en banc, of the March 24, 1975 decision of a three-member panel of this Court affirming the district court's order of suppression.

The pertinent evidence suppressed was a passport indicating that the appellee had illegally entered this country, which was produced by him following his brief detention and questioning by a U.S. Border Patrol Agent at a bus station in Malone, New York. In affirming the order of suppression, the panel agreed with appellee's argument that the "search" in question did not occur at a

"functional equivalent of the border," the parameters of which were suggested in Almeida-Sanchez v. United States, 413 U.S. 266, 272-273 (1973), nor could it otherwise be justified in this case. Moreover, the panel suggested that rather than "watering down the probable cause requirements of the Fourth Amendment ..." to meet the needs of the government to protect the integrity of our borders (slip op. 2493), such actions by immigration officials would be valid if "tolerably confined either by legislation or departmental ... rules and regulations subject to judicial review for reasonableness." (slip op. 2495).

We do not challenge the panel's rejection of the sole argument made before it by the government for justifying the minimal intrusion upon appellee's constitutionally protected rights, i.e., that it occurred at a functional equivalent of the international border. However, insofar as the panel's opinion went beyond that question, and concluded without benefit of briefing by the litigants, that the "search" here could not otherwise be justified, it constitutes a marked departure from the existing law enunciated in other circuits, and warrants review by the Court en banc. There was, we submit, simply no search of appellee's person or property involved in this case. And, to the extent that there was a brief detention of appellee while he was questioned, the interrogation did not constitute an unreasonable intrusion judged by Fourth Amendment standards.

STATEMENT

The district court's oral statement of its factual findings adduced at the suppression hearing are set forth in the Appendix filed in this case (App. 75-77). For the Court's convenience, we state them here briefly. On the morning of December 31, 1973, appellee boarded a regularly scheduled bus, together with some 10 or 12 other passengers, at Messina, New York. Messina was the point of origin for the bus, and is located approximately three miles from the Canadian border, and eight miles from the nearest port of entry between the United States and Canada.

The bus traveled non-stop to Malone, New York, where it made a regularly scheduled stop at a travel agency that served as a bus depot. Upon ascertaining from the bus driver that the bus had not been inspected by Immigration officials in Messina prior to its departure, Border Patrol Agent Cowen boarded the bus and questioned the passengers in English, concerning their citizenship and place of birth. When appellee, who spoke only Italian, was questioned, he gave no response. The agent also asked for travel documents, but appellee again gave no response. Agent Cowan then gestured for appellee to follow him off the bus, which appellee did. Agent Cowan testified that he did not consider appellee to be under arrest at that time, although he admitted that appellee would have been detained had he attempted to leave.

In the office which served as a bus station, Agent Cowan contacted an Italian speaking priest by telephone, and requested that the priest speak to appellee, and inquire as to his name, where he was from, where he was going and to ask if he had any travel documents or passports. After speaking briefly to the priest, appellee handed Agent Cowan his passport. Agent Cowan examined the passport, and determined that it contained no documentation permitting appellee to be within the United States. He thereupon placed appellee under arrest, and a subsequent search of his person revealed the bus ticket which had been purchased in Messina.

ARGUMENT

EVEN THOUGH THE BRIEF DETENTION OF APPELLEE FOR QUESTIONING DID NOT OCCUR AT THE "FUNCTIONAL EQUIVALENT" OF THE BORDER, IT WAS CONDUCTED PURSUANT TO STATUTORY GUIDELINES AND WAS CONSTITUTIONALLY PERMISSIBLE.

In Almeida-Sanchez v. United States, supra, it was pointed out in the plurality opinion of the Court, that a "routine border search," conducted without a warrant and without probable cause, could validly be conducted, not only at the border itself, but at its "functional equivalents" as well (413 U.S. at 272). As examples, the Court noted that searches "at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be the functional equivalents of

border searches." (Id. at 273). Since the Fourth Amendment permits a limited search of a person and his belongings at the border, or its functional equivalent, without any particularized belief that he is carrying contraband or is entering the country illegally, it follows a fortiorari, that the lesser intrusion involved in this case would have been legal, had it occurred at the border's functional equivalent. Such was the thrust of the government's argument, which was rejected by the panel.[1/] We do not seek a

1/ In the district court, a stipulation was entered into by both parties that the legality of the procedure involved here would turn upon the question whether or not the bus station at Malone was determined to be a functional equivalent of the border, as that term was defined in Almeida-Sanchez, (App. 28-34, 73-74). Such a stipulation was, admittedly, improvidently entered into, and it led the district court to consider only that limited question (App. 78), although the evidence adduced at the suppression hearing was sufficient to determine the reasonableness of appellee's detention without relying upon the "functional equivalent" issue.

Insofar as such a stipulation amounted to an agreement as to the legal effect to be given to certain facts in controversy, it was improper and not binding on this Court. Estate of Sanford v. Commissioner, 308 U.S. 39, 50-51 (1939). Indeed, the panel made no reference to the stipulation in its opinion, and apparently did not feel bound by it insofar as its decision rested on broader Fourth Amendment grounds.

While the government may have been at fault for relying solely on its "functional equivalent" argument before the panel in this case, that alone, we submit, does not merit a denial of our petition for rehearing since the opinion of the panel went beyond the functional equivalent argument, and thus departed from existing law with its suggestion that the intrusion involved here was a "search", requiring a showing of probable cause for its justification. The government should be permitted to state its views on this important issue.

reconsideration of the panel's holding that the bus station at Malone was not such a functional equivalent. However, the panel's conclusion that the "search" involved here could not otherwise be justified under existing law was unwarranted.

> A. Contrary to the Panel's View, the boarding of the bus by the Border Patrol Agent and the limited questioning of its passengers, including appellee, did not constitute a "search" or any other invasion upon constitutionally protected rights.

Border Patrol Agent Cowan boarded the public conveyance in which appellee was a passenger at a regularly scheduled stop in Malone, New York. He then questioned all of the passengers as to their citizenship and place of birth. At the time, he had no particularized reason to suspect that any of the passengers on the bus were illegal aliens, although he did know that the bus had not been inspected by immigration officials prior to its departure from Messina, and that "numerous" illegal entrants were apprehended on such buses (App. 44-45). The panel apparently viewed this procedure as an illegal "search", pointing out specifically:

> The search [footnote omitted] here involved an interrogation of the passengers in a bus ... .

(slip op. 2486).[2] In an explanatory footnote, the panel added:

> Although the initial governmental intrusion here involved was only a request for identification, it was nevertheless a search and to the extent that the appellee was also detained it amounted to a seizure of the person as well. Cf. Terry v. Ohio, 392 U.S. 1, 34-35 (1968) (White, J., concurring); Reich, Police Questioning of Law Abiding Citizens, 75 Yale L. J. 1161 (1966).

(Id. at 2486, n. 9). While we agree that at the time appellee was escorted off the bus, there had been a seizure of the person within the meaning of the Fourth Amendment,[3] up until that time, there had been no intrusion upon appellee's Fourth Amendment rights.

2/ The panel cited the provisions of 8 U.S.C. 1357(a)(3), which authorizes immigration officials, within a "reasonable distance" from any external boundary of the United States, to "board and search" any "conveyance" for aliens (slip op. 2484). While we do not believe the Border Patrol Agents action in this case constituted a "search" within the meaning of the statute, which contemplates a search for concealed aliens (United States v. Montez-Hernandez, 291 F. Supp. 712, 715, n. 6 (E.D. Cal. 1968)), we submit that the questioning of individuals within the plain view of the Border Patrol Agent certainly does not constitute a "search" within the meaning of the Fourth Amendment, requiring probable cause for justification.

3/ "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person." Terry v. Ohio, 392 U.S. 1, 16 (1968).

In Terry v. Ohio, supra, n. 3, Mr. Justice White stated, in his concurring opinion:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone in the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.

(392 U.S. at 34). In short, we submit that there is nothing in the Constitution or governing case law which prohibits a policeman, or as here, an immigration official, from approaching an individual and asking him a few brief questions designed to ascertain if he is legally in this country. To be sure, the persons refusal to answer or otherwise cooperate, without more, would not warrant detention. But when the individual voluntarily cooperates, or as here, attempts to cooperate but is hindered by a language barrier, the brief exchange does not involve an encounter subject to Fourth Amendment scrutiny.[4/]

Nor does the fact that the Agent had to board a stopped bus to question appellee alter the situation. "[T]he Fourth Amendment protects people, not places" (Katz v. United States, 389 U.S. 347, 351 (1967)), and questions which could have been directed to appellee had he been standing in

4/ There was no doubt that appellee's failure to respond to Agent Cowan's questions was because of the language barrier, and not because appellee chose to ignore the questions. Appellee testified that he did not understand the Agent's questions, but that he kept showing him his bus ticket because he (appellee) did not know what else to do (App. 3).

the bus station, or preparing to board the bus, involve no greater degree of an invasion of privacy simply because appellee was seated on a public bus.

B. The Brief Detention of Appellee for Questioning Did Not Constitute an Unreasonable Seizure.

1. If, as we argue, the initial questioning of appellee was proper, the next question is whether the Border Patrol Agent's brief detention of petitioner for purposes of getting an interpreter to direct questions to him was unwarranted. The type of confrontation between immigration officials and the general population as involved here, is similar to the type of encounter involved in Terry v. Ohio, supra, in the sense that, as a practical matter, it could never be subject to the warrant procedure (See 392 U.S. at 20).[5/]

5/ By this, we do not mean that we concur with the view of the panel, expressed on an issue not involved in this case, that search warrants could not constitutionally issue authorizing the stopping and searching of automobiles, under the guidelines set forth in the concurring opinion of Mr. Justice Powell in Almeida-Sanchez v. United States, supra, 413 U.S. at 275-285 (slip op. 2491-2494). We think that such warrants may justifiably be issued in the area near the Mexican border, where the incidence of entries by illegal aliens is much higher than in the area of the Canadian border. A majority of the Justices of the Supreme Court have indicated that they agree (slip op. 2491), although a recent panel of the Ninth Circuit has ruled that such "warrants of inspection" are repugnant to Fourth Amendment standards. See United States v. Martinez-Fuerte, 9th Cir., No. 74-2462, decided March 5, 1975. It is doubtful that conditions near the Canadian border would justify the issuance of such warrants, but the resolution of that question should be reserved until the issue is presented, if ever, in a proper factual setting.

As such, it must be tested "by the Fourth Amendment's general proscription against unreasonable searches and seizures." (Ibid.). In assessing the reasonableness of the brief detention, it is necessary to weigh the governmental interest in maintaining the integrity of our borders, balanced against the invasion upon constitutionally protected rights involved, recognizing that "the scope of the particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness." Terry v. Ohio, supra, 392 U.S. at 18, n. 15.

At the time Agent Cowan escorted appellee off the bus, he knew that he could not speak English and was on a bus which had traveled non-stop from an area immediately adjacent to the Canadian border, and had failed to produce any identification or documentation indicating his right to be within this country. In light of those facts known to the Border Patrol Agent at the time, we submit that his action in detaining appellee for further brief questioning by an interpreter, resulting in the production of a passport indicating that appellee was illegally in the country, was entirely reasonable judged by Fourth Amendment standards. The intrusion was minimal, of brief duration, and designed solely to ascertain if appellee had entered the country legally.

Moreover, the Border Patrol Agent's questioning of appellee was authorized by statute, and was conducted

within the restrictions imposed by statute. Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without a warrant -
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *

Here, appellee's inability to converse, in even the most limited manner in the English language, gave Agent Cowan reason to believe that he was an alien. See Cheung Tin Wong v. I.N.S., 468 F.2d 1123, 1128 (D.C. Cir. 1972). Having reached such a conclusion, the requesting of appellee's passport was certainly within the restrictions of the statute, authorizing only questions designed to ascertain if appellee had a right to be within the United States.

Furthermore, while the legislative history of this particular provision is unilluminating, it is reasonable to conclude that Congress intended to authorize a brief detention to accomplish such interrogation. Immigration officials would hardly require statutory authority to question persons who voluntarily answer without need for brief detention. Also, the fact that the statute authorizes such questioning "without a warrant," indicates that the framers contemplated

a limited intrusion upon Fourth Amendment rights.

That statute represents the considered judgment of Congress that the measures it authorizes are essential to the effective enforcement of the immigration laws and are consistent with the reasonableness standard of the Fourth Amendment. That judgment is entitled to considerable respect. See United States v. Biswell, 406 U.S. 311, 315-317 (1972); Colonnade Catering Corp. v. United States, 297 U.S. 72, 76 (1970).

Our argument that the brief detention of appellee was not violative of any Fourth Amendment standards is supported by decisions of other circuits. The Tenth Circuit has consistently held that neither the Supreme Court's decision in Almeida-Sanchez v. United States, supra, nor any requirement of the Fourth Amendment, prohibits immigration officials from briefly detaining individuals whom they believe are aliens, for purposes of ascertaining their right to be within this country. See, United States v. Martinez, 507 F.2d 58, 60-61 (10th Cir. 1974); United States v. Newman, 490 F.2d 993, 995 (10th Cir. 1974); United States v. Bowman, 487 F.2d 1229, 1231 (10th Cir. 1973). In a pre-Almeida-Sanchez decision, the Eighth Circuit apparently adopted the same view. Shu Fuk Cheung v. I.N.S., 476 F.2d 1180 (8th Cir. 1973). See also, Hon Keung Kung, 356 F. Supp. 571 (E.D. Mo. 1973). The District of Columbia Circuit has adopted the view that

while an immigration official may question anyone whom he believes to be an alien as long as the individual is cooperative, that "forced detention[s] for questioning" may only be justified upon a reasonable suspicion that the person is an alien illegally in the country. Cheung Tin Wong v. I.N.S., supra, 468 F.2d at 1126-1127. However, in that case, the court concluded that the brief detention of a taxicab in which the petitioner was riding, while he was asked how he came to the United States was justified merely upon the immigration officials belief that the petitioner was an alien, and was not the type of "forcible detention" requiring a reasonable suspicion of illegal alien status. Id. at 1127-1128.

2. In a case which is presently pending before the Supreme Court, the Ninth Circuit held that a forcible stop of a vehicle for purposes of questioning the occupants as to their citizenship and right to be within the United States is unconstitutional unless the immigration official possesses a "founded suspicion" that the occupants of the vehicle are illegally in the country, thereby justifying the forcible stop. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), cert. granted, No. 74-114, October 15, 1974, argued February 18, 1975. It is the government's position in

that case, relying in part upon the reasoning of Mr. Justice Powell's concurring opinion in Almeida-Sanchez (413 U.S. at 275-285), that such limited intrusions are not unreasonable, where the Border Patrol Agents have reason to believe that the detainee is an alien, and even if conducted on a wholly random basis without any particularized suspicion that the occupants of a particular vehicle are aliens, in the area of the Mexican border with its perculiarly high incidence of illegal entrants. While we do not contend that conditions in the vicinity of the Canadian border are such as to justify such random stops of persons for questioning as to their right to be in this country, it is likely, we think, that the forthcoming Supreme Court decision in Brignoni-Ponce may set forth guidelines for judging the constitutionality of such limited intrusions as the one involved in this case. We therefore respectfully submit that it may be appropriate for the Court to defer disposition of the instant petition for rehearing until the Supreme Court renders its decision in Brignoni-Ponce, which may reasonably be expected before the expiration of the current term of that Court.

Moreover, two other cases are presently before the Supreme Court which involve issues relevant to the case here. In Bowen v. United States, No. 73-6848, and United States v. Ortiz, No. 73-2050, argued February 18, 1975, the issue to be decided is whether warrantless stops and searches of vehicles at fixed immigration checkpoints, conducted without

probable cause to believe that the particular vehicle stopped contains any concealed illegal aliens, violates the Fourth Amendment. Insofar as the detention of appellee occurred at a fixed point where bus passengers were routinely questioned as to their right to be in the country, this case in similar to such intrusions occurring at fixed immigration checkpoints. Should the Supreme Court decide that searches at such permanent locations are valid, it would lend support to our assertion that the much more limited intrusion involved here was reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Rehearing with Suggestion for Rehearing En Banc should be granted. Alternatively, we respectfully submit that the Court defer disposition of the Petition until the Supreme Court has decided the cases discussed herein, and then consider our argument in light of the Supreme Court's decision in those cases.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 1975, two copies of Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc were mailed to Dennis B. Schlenker, Esq., 182 Washington Avenue, Albany, New York, 12210, Attorney for the Appellee.

R. H. Wallace Jr.

REUBEN H. WALLACE, JR.